8-9-2011

Hart v. Idaho State Tax Com'n Appellant's Brief Dckt. 38756

IN THE SUPREME COURT OF THE STATE OF IDAHO

PHILIP L. HART, **Appellant**	:	
	:	**DOCKET NO. 38756-2011**
vs.	:	
IDAHO STATE TAX COMMISSION and IDAHO BOARD OF TAX APPEALS, **Respondents.**	:	

****

OPENING BRIEF OF APPELLANT HART

****

Appeal from the District Court of the First Judicial District

****

The Honorable John T. Mitchell, Presiding

Starr Kelso
Attorney at Law # 2445
P.O. Box 1312
Coeur d'Alene, Idaho 83816

Attorney for Appellant

Lawrence G. Wasden
Attorney General
William A. von Tagen
Deputy Attorney General
P.O. Box 36
Boise, Idaho 83722

Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF CASES

STATUTES

CONSTITUTIONS

MISCELLANEOUS

STATEMENT OF CASE

Nature Of The Case:

This appeal addresses the distinction between *facial* and *factual* subject matter jurisdiction and the right to attend civil proceedings.

Course of Proceedings Before District Court and Disposition:

1. On October 22, 2010 Appellant, Philip L. Hart (hereafter Hart), in compliance with Idaho Rule of Civil Procedure Rule 84 (b) and (d), filed his Appeal (R p. 1) from the Idaho Board of Tax Appeals (hereafter Board of Tax Appeals) Decision in Docket Number 21551 and Docket Number 21552, the Idaho Board of Tax Appeals Final Order Dismissing Appeal entered August 24, 2010, and the Idaho Board of Tax Appeals Order Denying Appellant Hart's Motion for Reconsideration entered September 24, 2011.
2. On November 1, 2010 the Idaho State Tax Commission (hereafter Tax Commission) filed an IRCP 12(b)(1) Motion to Dismiss Hart's appeal. It claimed the district court lacked subject matter jurisdiction to hear the appeal. R p. 16.
3. The Tax Commission despite its IRCP 12 (b)(1) motion filed Affidavits of Kristine Gambee and Shelley Sheridan. R. p. 10-15.

4. On December 7, 2010 the district court granted Hart's motion to strike the Affidavits of Gambee and Sheridan from the Tax Commission's Motion to Dismiss. R. p. 229, Tr. p. 6, l. 8-10.
5. On December 8, 2010 the district court entered its Memorandum Decision and Order Granting Respondent's Motion to Dismiss. R. p. 232. The decision, in relevant part, states:
    a. The Idaho Board of Tax Appeals acknowledged Hart's Article III Section 7 argument for tolling the deadline for filing his appeal.
    b. The Appeal was untimely because it was filed on March 31, 2010.
    c. The Board of Tax Appeals lacked jurisdiction to hear his appeal.
    d. The lack of Board of Tax Appeals jurisdiction causes this Court to lack jurisdiction
6. On December 14, 2010 Hart filed a Motion for Reconsideration from the district court's decision granting the IRCP 12 (b) (1) motion to dismiss. R. p. 244. Hart filed a notice of hearing for March 16, 2011. R. p. 247
7. Hart filed his Affidavit in Support of Motion For Reconsideration of the order granting the motion to dismiss, on January 24, 2011. R. p. 296.
8. On February 4, 2011 the Tax Commission filed a response to Representative Hart's Motion for Reconsideration of the order granting the motion to dismiss. R. p 248

9. Hart's counsel obtained new hearing dates from the district court. On March 8, 2011 Representative Hart filed an Amended Notice of Hearing because he would not be able to attend the hearing as originally noticed. The legislature would still be in session. In order to be at the hearing Hart would have to forego his legislative duties. The new hearing was scheduled for May 31, 2011, the earliest date made available by the district court, because the legislative session would be concluded by that date and he could attend the hearing. The Notice sets forth the reason for the changed date is Hart's legislative duties. R. p. 313

10. On March 10, 2011 the Tax Commission and the Board of Tax Appeals filed an Objection to the Amended Notice of Hearing. R. p. 314.

11. On March 11, 2011, before Representative Hart could file his Reply to the objection to the amended hearing date, the district court entered its Order refusing to permit the hearing to be moved to May 31, 2009. R. p. 316.

12. On March 14, 2011 Representative Hart filed a Motion for Reconsideration of the order requiring the hearing to be held on March 16, 2011. A supporting affidavit of his counsel was filed. R. p. 324-330.

13. On March 16, 2011 the affidavit of Phil Hart, in support of the motion for reconsideration of the order requiring the hearing to be held on March 16,

2011, was prepared and signed by Hart, while on the floor of the House of Representatives, and filed. R. p. 334.

14. At the hearing on March 16, 2011 the district court denied the amended hearing date that would have permitted Representative Hart to attend in person and assist his counsel at hearing. Tr. p. 27, l. 20-25, p. 28, l. 1-5.

15. On March 16, 2011, after denying Hart's motion for reconsideration of the district court proceeded with the hearing, in Hart's absence, on Hart's Motion for Reconsideration of the decision granting the IRCP 12 (b) (1) motion to dismiss. Tr. p. 28, l. 6.

16. On March 17, 2011 the district court issued its Order Denying Appellant Hart's Motion for Reconsideration. R. p. 341.

17. On March 17, 2011 the district court entered its Order of Dismissal and Judgment of Dismissal. R. p. 354-360.

18. The appeal to this Court was filed by Representative Hart on April 22, 2011. R. p. 362.

Statement of Facts:

The district court's *December 8, 2010* decision noted that the Tax Commission's IRCP Rule 12 (b) (1) raised a *facial* challenge to its jurisdiction. It identified the proper standard for a IRCP 12 (b)(1) *facial* review of subject matter jurisdiction. The Court is to look only to the pleadings, and all inferences are

viewed in the light most favorable to the non-moving party. The question is not whether the plaintiff will ultimately prevail, but whether the party is entitled to offer evidence to support the claims. R. p. 233.

Unfortunately the district court proceeded with a *factual* review. The district court considered the Tax Commission's memorandum and the Board of Tax Appeals record and, *without any factual record*[1] on the IRCP 12 (b) (1) *facial* determination, found the facts *asserted* by Tax Commission and Board of Tax Appeals to be *the* facts. The district court entered as a finding of fact that "Hart failed to timely file his appeal with the IBTA" (R. p. 237) and that Hart's "appeal was filed on March 31, 2010." R. p. 234. The district court summed up its analysis as follows:

> "It was Hart's decision alone to fail to timely perfect his own appeal. That fact and that fact alone is what caused the IBTA to lack jurisdiction, and which now causes this Court to lack jurisdiction to hear Hart's appeal from the IBTA decision which decided that it lacked jurisdiction."
>
> "(It) cannot hear new evidence to determine if it has jurisdiction."; and
>
> "This Court does not have jurisdiction to hear this appeal from the IBTA, and new evidence at a trial de novo will never and can never change that fact. This Court does not have jurisdiction to hear this appeal from the IBTA because the IBTA lacked jurisdiction to hear the appeal from the Commission." R. p. 240.

[1] The Affidavits of Sheridan and Gambee were stricken by the district court.

On December 14, 2011 Hart filed a Motion for Reconsideration of the district court's December 8, 2010 memorandum decision. R. p. 244.

On February 4, 2011 the Tax Commission and Board of Tax Appeals filed a Supplemental Response to Hart's Motion for Reconsideration. The Tax Commission and Board of Tax Appeals, at page 2 of their brief, concede that Hart mailed his "notice of appeal" on March 30, 2010. R. p. 300.

In support of Hart's Motion for Reconsideration of the December 8, 2010 IRCP 12 (b) (1) dismissal, the Affidavit of Phil Hart was filed on January 24, 2011, to specifically set forth the existence of differences regarding relevant facts given the district court's initial decision considered matters outside of the pleadings. R. p. 296. The hearing was initially scheduled for March 16, 2011. Hart also served Requests for Admission on the Tax Commission and the Board of Tax Appeals on February 15, 2011 to further clarify the existence of relevant factual disputes.

On March 8, 2011, after learning that the Idaho Legislative session would not be completed, as hoped, in time for the March 16th hearing, Hart filed an Amended Notice of hearing. It scheduled the hearing for May 31, 2011 and noted therein it was so that Hart, who was attending to his duties, as an Idaho State Representative, could personally attend the hearing and assist counsel.

The Tax Commission filed an Objection to the Amended Notice of Hearing on March 10, 2011. On March 11, 2011, less than twenty-four (24) hours after the

objection and before the district court had received or had an opportunity to review Hart's Reply to the Objection to the Amended Notice of Hearing, the district court entered its Order requiring the hearing to be held on March 16, 2011.

On March 14, 2011 Hart filed a Motion for Reconsideration of the Order requiring the hearing to be held on March 16, 2011. The affidavit of Starr Kelso was filed. An affidavit of Hart was filed on March 16, 2011 prior to the hearing. R. p. 296.

At the hearing held on March 16, 2011, the district court denied Hart's Motion to Reconsider its Order requiring the hearing to be held on March 16, 2011. It then immediately commenced oral argument on Hart's Motion for Reconsideration of its decision dismissing the appeal. Tr. p. 27-28.

On March 17, 2011, the district court entered its Order Denying Hart's Motion For Reconsideration and granted the Board of Tax Appeals Motion to Strike the Requests for Admission.

The district court's Order acknowledged that neither the Board of Tax Appeals nor it had addressed Hart's Article III Section 7 argument. The district court stated that "both the IBTA and this Court recognized that, even if Hart's argument for tolling the deadline within which he was to file his appeal was proper, his appeal was nonetheless untimely." R. p. 344. The district court's written decision juxtaposes the terms *facial* and *factual* but the decision reflects

that it did recognize Hart's contention that the court had improperly conducted a *factual* review instead of a *facial* review. R. p. 345.

The district court's decision asserted that "throughout its decision, (it) never makes reference to any substantive material referred to in the stricken affidavits or the agency record" and that it "did in fact limit itself to a review of the pleadings." R. p. 345-346. The district court determined that "consideration of dates on which pleadings were filed," even though these dates were in dispute, does not amount to a factual determination. R. 346.

The district court however did acknowledge that Hart, in response to the court's factual determination, argued the Tax Commission was in error regarding the date on which his Notice of Appeal was filed, that the Notice of Appeal filing date was the date of mailing (March 30, 2010) as reflected by the U.S. Post Office postmark, and that Hart's two checks and promise to pay amounted to "substantial compliance" under the rules. R. p. 347

The district court found that Hart's letter entitled "Notice of Appeal to the Board of Tax Appeals" was not a Notice of Appeal because it didn't comply with IDAPA 36.01.048.01.[2] It found that Hart's letter of March 31, 2010 "is his appeal."

[2] In a 12 (b) (1) motion to dismiss this wouldn't be inquired into. Additionally the Board of Tax Appeals never questioned substantial compliance. It merely erroneously found the filing date was the date of receipt and not the date of mailing as shown by the postmark. In any event the district court's finding is not consistent with Idaho case law. The only purpose of serving a notice of appeal is to inform each party whose rights are involved that an appeal has in fact been taken. Mendini v. Milner, 47 Idaho 322, 326, 276 P. 35 (1929). Where opposing parties are not

R. p. 349. The district court then, in disregard of the Tax Appeals Board's letter of April 5, 2010 giving Hart 14 days, until April 19, 2010, to perfect his appeal. Board of Tax Appeals Record No. 4. The district court further found that Hart didn't provide proof of compliance and didn't seek a receipt from the Commission.[3] It also found "neither appeal" by Hart "was timely and neither appeal contained proof of compliance with the deposit requirement." R. p. 350.

The district court also proceeded to find that Hart's promissory note was never approved as a proper payment by the Commission and that the Board was within its right to question the reliability of a promise to pay. R. p. 351.

The district court also granted the Board of Tax Appeals' motion to strike Hart's Requests for Admission by reasserting that it had not conducted a factual review. R. p. 352.

ISSUES ON APPEAL

1. **Whether the district court erred in its analysis of the *facial* challenge to its jurisdiction, under IRCP 12 (b) (1), by applying a factual challenge analysis.**
2. **The district court abused its discretion by requiring the hearing to be held on March 16, 2011 when Hart was, for good cause, unavailable to attend.**
3. **Appellant Hart is entitled to an award of reasonable attorney fees incurred in this appeal.**

---

prejudiced or misled, this court has many times held notices of appeal to be sufficient although they were irregular in some respects, and contained technical defects. *Turner v. Purdum, 77 Idaho 130, 136, 289 P. 2d 608 (1955).*

[3] However, see Exhibit D to the Affidavit of Shelly Sheridan which is No. 6 contained in the Board of Tax Appeals record on appeal. It specifically confirms receipt of all of Hart's payments.

ARGUMENT

1. **The district court erred in its analysis of the *facial* challenge to its jurisdiction, under IRCP 12 (b) (1), by applying a factual challenge analysis.**

Whether a dismissal for lack of jurisdiction pursuant to I.R.C.P. 12 (b) (1) was properly granted is a question of law over which this Court exercises free review. *Owsley v. Idaho Industrial Commission, 141 Idaho 129, 106 P. 3d 455 (2005).* In a IRCP 12 (b) (1) *facial* review the Court is to only look to the pleadings, and all inferences are viewed in the light most favorable to the non-moving party, in determining whether it has subject matter jurisdiction of a case. *Id. citing Young v. City of Ketchum, 137 Idaho 102, 104, 44 P. 3d 1157, 1159 (2002).*

Usually the pleadings consist of a complaint and an answer. *I.R.C.P. Rule 7(a).* In a case in which a complaint is responded to by an IRCP 12 (b) (1) motion to dismiss, the only pleading before the district court is the complaint. Thus in this case, for the purpose of an IRCP 12 (b) (1) analysis, the only pleading before the district court is the IRCP 84 (b) petition. The motion is to be decided solely on the basis of the petition and without the consideration of any collateral information. *see Owsley, supra at p. 133.*

Hart's appeal was filed pursuant to I.C. § 63-3812 in full compliance with IRCP 84 (b) and (d). Hart's petition establishes for the purpose of the appeal the

date of the last decision of the Tax Appeals Board appealed from, and the date of the filing of the petition. The district court specifically held that,

> "Hart is correct in asserting his appeal is specifically provided for by statute and his appeal to this Court was timely." P. 7.

There is no dispute that Hart fully complied with I.R.C.P. Rule 84 (d).

Under a *facial* determination of its jurisdiction the district court's finding that Hart's appeal is specifically provided for by statute and that his appeal was timely filed should have concluded its review of the IRCP 12 (b) (1) challenge to its subject matter jurisdiction.

The district court asserted in its decision denying Hart's Motion for Reconsideration of its IRCP 12 (b) (1) dismissal that it did not conduct a *factual* review of its jurisdiction.

> "this Court, throughout its decision, never makes reference to any substantive material referred to in the stricken affidavits or the agency record."[4] P. 5

Nonetheless both of the district court's decisions rely on factual determinations based upon the Record on Appeal provided by the Board of Tax Appeals. This Board of Tax Appeals record contained the stricken affidavits and other assertions of fact that are disputed by Hart.

---

[4] If the district court had relied upon the agency record to support its factual findings that would also be err. The administrative record of the matter sought to be reviewed is to be utilized "as merely an articulation of the position of the Tax Commission as a party to the action. *Gracie, LLC v. Idaho State Tax Commission, 149 Idaho 570, 237 P. 3d 1196 (2010)*

The district court failed to appreciate the fact that Hart's Reply to Respondents' Response to Motion for Reconsideration was separated into two separate arguments, facial and factual. The facial argument addressed the standard to be used for a facial review and addressed that "Even under a "factual" review the decision is clearly erroneous." This failure led the district court to state that "Presumably, Hart takes no issue with the Court's referring to the Agency Record." R. p. 346-347.

The district court took the position, contrary to established case law, that the Board of Tax Appeals record on appeal was a "pleading" that it could utilize to determine a facial challenge to subject matter jurisdiction.

> "the Court did in fact limit itself to a review of the pleadings...*this Court set forth the factual and procedural history* of the case, including citing dates on which pleadings were filed and on which hearings were held." P. 6 (emphasis added)

The district court confirmed its excursion beyond the pleadings in its Order, denying Hart's Motion for Reconsideration, by noting that the information in the stricken affidavits was contained in the agency record (R. p. 345) and that "the Court's reference to the record is limited only to the dates on which pleadings were filed. R. p. 347. The Board of Tax Appeals record on appeal is to be utilized "as merely an articulation of the position of the Tax Commission as a party to the action." *Gracie, LLC v. Idaho State Tax Commission, 149 Idaho 570, 237 P. 3d*

1196 (2010).[5] By referring to the agency record on appeal and accepting information contained therein, even when disputed by Hart's March 16, 2011 affidavit, as established fact on contested issues, the district court defeated the whole purpose for holding a trial *de novo.* The court even held that "this Court cannot now hear new evidence to determine if it has jurisdiction" (R. p. 240) and that "new evidence at a trial *de novo* will never and never can change that fact." R. p. 240.

Examples of factual determinations made, or adopted by the district court, that are unsupported by the pleading are:

December 8, 2010 Memorandum Decision and Order Granting Respondent's Motion to Dismiss

a. On March 31, 2010, Hart filed his appeal with the Idaho Board of Tax Appeals and submitted the amount of $9,462.04 to the Commission. R. p. 234.

b. The IBTA found Hart's appeal untimely. R. p. 234.

c. Hart failed to timely file his appeal with the IBTA. R. p. 237.

d. Hart's appeal was filed on March 31, 2010. R. p. 238.

[5] This point was raised by Hart in his Reply to Respondents' Response to Motion For Consideration. P. 3 Despite this specific citation the district court stated, in it's decision denying Hart's Motion for Reconsider, that Hart did not "cite the Court to any authority whatsoever establishing that consideration of dates on which pleadings were filed amounts to a factual determination." Certainly if the dates that "pleadings" were filed is a contested factual issue, such as it is in this case as reflected by Hart's Affidavit in support of his Motion for Reconsideration, the identification of dates of filing is a factual determination by the district court.

e. Hart disregarded the time limitation within which to perfect his appeal. R. p. 239.

f. It was Hart's decision alone to fail to timely perfect his own appeal. That fact and that fact alone is what caused the IBTA to lack jurisdiction to hear his appeal, and which now causes this Court to lack jurisdiction to hear Hart's appeal from the IBTA decision which decided it lacked jurisdiction. R. p. 239.

g. The Court does not have jurisdiction to hear this appeal from the IBTA because the IBTA lacked jurisdiction to hear the appeal from the Commission. R. p. 240.

March 17, 2011 Order Denying Appellant Hart's Motion for Reconsideration

a. Hart did author a one-page letter to IBTA entitled "Notice of Appeal to the Board of Tax Appeals on March 30, 2010." R. p. 347.

b. On March 30, 2010, Hart filed his *actual* five-page "Notice of Appeal to the Idaho Board of Tax Appeals." R. p. 347. (emphasis added)

c. Hart's letter dated March 30, 2010, in no way complied with the requirements of a State Tax Commission appeal. R. p. 348.

d. "Thus, *as found* by the IBTA *and this Court*, Hart's March 31, 2010, Notice of Appeal, *is* his appeal." R. p. 349. (emphasis of 'is' in original.)

e. Hart did not substantially comply with his Notice of Appeal. R. p. 349.

f. Hart's appeal was materially defective and did not substantially comply with either the IDAPA or the Idaho Code. R. p. 349-350.

g. Hart's appeal was untimely and does not comply with IDAPA." R. p. 350.

h. Hart's promissory note was never approved as a proper payment by the Commission. R. p. 351.

All of these factual findings are disputed by Hart and are matters that Hart contends were improperly determined by the Board of Tax Appeals. These "facts" are a portion of what needs to be litigated in a trial *de novo*. All disputed facts need to be litigated in a trial *de novo* before the district court.[6]

Only if the material jurisdictional facts are not in dispute is the moving party entitled to prevail as a matter of law on a 12 (b) (1) motion. *Torres-Negron v. J & N Records, LLC, 84 U.S.P.Q. 2d 1769, 504 F. 3d 151, 163 (1st Cir. 2007).* On a *factual* determination, even though not presented to the district court, if the

[6] See the Affidavit of Phil Hart in Support of Motion for Reconsideration. This affidavit was submitted with the Motion for Reconsideration in an attempt, if the district court continued to apply a *factual* determination to the motion do dismiss, to clarify for the district court that these issues were in dispute and contested by Hart.

plaintiff presents sufficient evidence to create a genuine dispute of material (jurisdictional) facts, the case is to proceed to trial. *Id. p. 163.* In Hart's briefing on his Motion for Reconsideration of the Rule 12 (b) (1) dismissal, since the district court applied a *factual* determination to its decision regarding subject matter jurisdiction, Hart filed his affidavit. Hart's affidavit specifically raises genuine disputes regarding the jurisdictional facts and in conducting its *factual* review these were not addressed, in any manner, by the district court.

ARGUMENT

2. The district court abused its discretion by requiring the hearing to be held on March 16, 2011 when Hart was, for good cause, unavailable to attend.

The issue of a party's right to be present at hearings that involve the taking of his property by the State it is of fundamental significance across the entire scope of all civil litigation. This issue's presence in this appeal could be argued to be of no consequence. It simply could be argued, "So what, the judge was going to do what he was going to do regardless of whether or not Hart was present at the hearing."[7] If that argument is taken as true, oral argument is of no substantive meaning. If the district court already has its mind made up, oral argument in any case would amount to nothing more than mere showmanship, by the court and the

[7] As discussed in depth below, Due Process violations of this nature constitute errors so basic to a fair procedure that they can never bee treated as harmless. *see Chapman v. State of California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed 705 (1967).* In this regard it is disturbing that the hearing was completed at 5:12 p.m. and the 13 page Decision, Order of Dismissal, and Judgment of Dismissal were filed the next day between 12:49 and 12:50 p.m. R. p. 341-357.

lawyers, for the purpose of allowing clients their "day in court." Simply put, a complete waste of the court's and the parties' time and resources.

The hearing on Hart's Motion for Reconsideration of the decision dismissing Hart's appeal, based on 12 (b) (1), was initially noticed for hearing by Hart's counsel for the earliest available date available to the district court. At the time of filing the notice of hearing it was hoped that Hart's statutory and constitutional duties as an elected Representative to the Idaho State Legislature during the Legislatures 2011 session would be completed, or wound down to the extent that he could be absent from the legislature, for the time necessary to travel from Boise to Coeur d'Alene to attend and return.

On Sunday March 6, 2011, Hart's counsel learned that the legislative session would not be completed, or wound down enough so that Hart could be absent from it for the time necessary to attend the hearing

On Monday March 7, 2011, at approximately 9:05 o'clock a.m., Hart's counsel pursuant to First Judicial District Local Rule 3 contacted the judge's assistant to inquire about alternative dates. Later that day Hart's counsel was informed the next two available dates on the court's calendar were May 31st and June 7th. It was Hart's counsel's understanding from this discussion with the judge's assistant that the new hearing date was obtained in compliance with the court's procedures. Counsel for Hart, in his thirty (30) plus years of practice of

law, has never had an objection made to the rescheduling of a hearing filed by opposing counsel. Likewise, counsel has never had a district court refuse the rescheduling of a hearing date, placed on the docket by counsel. Upon Hart conferring with his counsel it was determined that the Legislative session would be completed by May 31, 2011. Thus on March 8th an Amended Notice of Hearing was filed, faxed to the court in chambers, and mailed to Respondents' counsel.

On March 10, 2011 at approximately 6:00 o'clock p.m., after completing a conference with other clients, by fax bearing the time of 15:19:06, a copy of Respondents' Objection to Appellant's Amended Notice of Hearing was received by Hart's counsel. On March 11, 2011 Hart's response to the Objection was prepared and faxed to the court and Respondents' counsel at approximately 1:00 o'clock p.m. It was filed by the court clerk at 1:00 p.m. R. p. 319. Hart's counsel, feeling ill, immediately thereafter left the office.

The next day, March 12, 2011, Hart's counsel, while reviewing "in box" communications not reviewed before leaving the prior day, observed that the district court filed and then faxed an Order Granting Respondents' Objection to his office at 12:40 o'clock p.m. on March 11th. R. p. 316. The district court had prepared and faxed its Order to Hart's counsel twenty (20) minutes before the court clerk's receipt of Hart's reply and only 22 hours after the Objection was filed by the court clerk. R. p. 314, R. p. 316. On March 14th Hart filed a Motion for

Reconsideration of the Court's Order Regarding the March 16, 2011 Hearing. Hart's counsel filed his affidavit in support of this motion. R. p. 326.

Hart's counsel's affidavit stated, in part, the following:

1. That Appellant Hart wishes to be personally present in Court with his counsel when the Court hears argument on his motion for reconsideration.
2. It has been my practice as an attorney for over 30 years to advise my client(s) to be present in court whenever any matter concerning their interests is before a Judge for determination. Some clients, for whatever reason, have declined to follow my recommendation to be present, but the vast majority follow my recommendation and appear in court;
3. In my opinion it important that any client of mine be present in court when a matter is before a Judge for consideration that affects their interests. In my opinion it is important that the client observe first hand the proceedings of the court, arguments of counsel, and comments and/or decision of the Court. It is my opinion that it is of significant importance to me, as counsel representing my client, that my client be present in court at all times that a matter is before a Judge that affect their interests. Without fail during the course of the proceedings my client will communicate with me as the proceedings progress, either verbally or in writing, to convey questions, raise points that he/she feels should be

addressed with the court but which I have not yet addressed, or raise a point(s) that he/she believes I may have missed due to being distracted by ongoing arguments of counsel and or comments by the court. In short it is of substantive value and assistance to me while representing a client in any proceeding with any court to have my client sitting next to me and able to readily convey his/her thoughts to me as the proceeding progresses.

On March 16th, the day of the hearing, the affidavit of Hart was prepared, signed, and filed. R. p. 334. Hart's affidavit states, in part, as follows:

1. I am the duly elected Idaho State Representative for Legislative District 3;
2. The Idaho Legislature commenced its 2011 session on January 10, 2011 and it is still in session;
3. Today, March 16, 2011, I am in Boise, Idaho attending to my duties as the elected Idaho State Representative for Legislative District 3;
4. When my motion for reconsideration in this matter was originally filed, and scheduled for a hearing on March 16, 2011, I believed that there was a possibility that the 2011 Legislative Session would be completed, that the session would be near its end, and/or the daily time pressures and duties would be diminished so that I could be away from the Legislature for the time necessary to travel to Coeur d'Alene and attend the hearing in person. It was my understanding that March 16, 2011 was the earliest available

date for the Court, provided to my attorney by the Court, to hold a hearing on my motion for reconsideration. None of the possibilities that would allow me to attend the hearing on March 16, 2011, that I had hoped could possibly occur, have occurred. In fact I am finalizing this affidavit sitting at my desk on the floor of the House of Representatives while I am listening to (and discussing with others in person and on my "floor" phone) and participating in debate on the floor of the House of Representatives regarding proposed legislation to permit guns to be carried on college campuses. I also have three bills that in one manner or another I am sponsoring that are preparing to be heard in hearings and other legislation that I am attempting to draft;

5. I was personally present at the only other hearing held in this matter and I want to be present at the hearing on the motion for reconsideration as well as any and all future proceedings before the Court. I was advised by my attorney that he would contact the Court to see if we could get the hearing date rescheduled for a different date so that I would be able to personally attend the hearing;
6. On Monday March 7, 2011, I was contacted by cell phone text message and e-mail by my attorney and informed that he had received two alternative dates for the hearing from the Court. They were May 31st and

June 7th. I did not receive these messages until late in the day and I was not able to respond to my attorney until later that evening. I advised my attorney that the earlier of the two alternative days provided, May 31st, was a day that I could personally attend the hearing. It was agreed that an amended notice of hearing would be filed for that date. I was later contacted by my attorney and advised that the amended notice was filed and the hearing was scheduled for May 31st ;

7. On either the evening of March 10th or the morning of March 11th I was advised by my attorney that the Attorney General's Office had filed an "objection" to the amended hearing date and that my attorney was preparing a response.

8. My requesting my attorney to seek an alternative date, his doing so, and his being given an amended date for the hearing by the Court was done for the sole purpose that I could be present in Court with my attorney at the hearing. I want to be present in Court. I believe it is important for me to be in Court at any proceeding involving my rights and property so that I can listen, observe, and either verbally or in writing communicate my thoughts as they arise during the hearing to my attorney on matters that I believe are important and should be considered by my attorney when he presents oral

argument to the Court, when the Attorney General argues his position, and in response to any questions or comments of the Court;

9. On March 14th I was informed by my attorney that the Court had upheld the Attorney General's "objection" and that it was requiring the hearing to be held on March 16th. I was advised by my attorney that unbeknownst to him the Court had entered its order and faxed it to him, on March 11th, before he was even able to fax his reply to the "objection". I am informed that the Court's order was entered less than 24 hours after the "objection" was received by my attorney and that due to my attorney being ill, leaving his office early in the afternoon of March 11th, and the fact that on that date he was without a "regular" secretary that he did not see the order of the Court until Monday morning, March 14th, when he got to the office;

10. My attorney advised me that he would file a request for reconsideration of the Court's order requiring the hearing to be held on March 16th and ask that the hearing be held on the alternative date of May 31, 2011. My attorney later advised me that he had filed a motion for reconsideration with a supporting affidavit, and filed a copy by fax with the court clerk and faxed a copy to the Court's chambers, at approximately 2:30 o'clock p.m. on March 14th.

11. My attorney advised me the evening of March 15th, and this morning, that no response had been received from the Court to the motion for reconsideration of the Court's order requiring the hearing to be held today, March 16, 2011, at 4:00 o'clock p.m.

12. Today, March 16, 2011, I am in Boise attending to my duties as a Legislator on behalf of my constituents.

13. By the end of the day yesterday, March 15, 2011, even if I felt I could violate the trust of my constituents to be present at the Legislative session today, March 16, 2011, I would not do so. As noted, this affidavit is being prepared as I physically sit on the floor of the House of Representatives and the House is debating a very important piece of legislation which my constituents most certainly expect, and would demand, that I be present to vote on.

14. I want to be present in person at any hearing involving my personal rights and property and I would be present in Court, if I was not in Boise attending to my Legislative duties.

15. I do not understand how it would be practical, let alone possible, for me to effectively communicate with my attorney during any hearing held today before the Court by my listening into the proceedings via telephone conference call. Additionally, given my legislative duties I am not even able

to state with any reasonable degree of certainty where I might be, whether I might be in a committee meeting, what I might be doing, or whom I may be speaking to at 4:00 o'clock p.m. Pacific Standard time (5:00 o'clock p.m. Mountain Standard time) to even listen to the hearing on the telephone. In my opinion it would be an exercise in futility if listening in on the telephone is all that the Court will allow. I might just as well read what happened in a transcript prepared after the hearing. Needless to say my reading about what happened at the hearing, in a transcript, would not allow me to observe the proceedings and communicate my thoughts to my attorney as they occur and as the hearing progresses.

16. I request that the hearing not be held today. I request that the hearing be held on May 31, 2011, the alternate date that was provided to my attorney by the Court so that I could attend, so that I can be present in court at the hearing and listen, observe, and effectively and timely communicate with my counsel as the hearing proceeds.

At the commencement of the hearing on March 16, 2011 the district court did not have the Motion for Reconsideration of the hearing date, the Affidavit of Hart's counsel, or even its order granting the Respondents' objection to changing the hearing date before him. The district court did have the Affidavit of Hart. Tr. p. 19. Hart's counsel's oral argument emphasized to the district court that "having a

client present is not a mere convenience. Constitutionally so" and elaborated on the matters set forth in the affidavits, including why Hart listening to the proceedings over the telephone was not an alternative. Tr. p. 23-27.

Respondents counsel argued that it was "a fairly routine post-trial motion" but conceded that "There are some extraordinary pleadings here." Tr. p. 27.

The district court's denial of Hart's Motion for Reconsideration of the denying the rescheduling of the hearing so Hart could attend is reviewable on appeal after judgment as a corollary of the appeal from the judgment. *Johnston v. Pascoe, 100 Idaho 414, 419, 599 P. 2d 985 (1979).* Motions for extensions of time are addressed to the discretion of the court. *Id. p. 419.*

This Court reviews a district court's exercise of discretion under the abuse of discretion standard. This Court considers (1) whether the district court correctly perceived the issue as one of discretion; (2) whether the district court acted within the outer boundaries of its discretion and consistent with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason. *Lindberg v. Roseth, 137 Idaho 222, 46 P.3d 518 (2002).*

The district court's original order, entered March 11, 2011, denying the rescheduled hearing date, entered prior to Hart's counsel being able to file a reply

to the objection, implies that it perceived its ruling, on Respondents' Objection to the Amended Notice of Hearing, as being one of unbridled discretion.

> "By filing his Motion for Reconsideration, and Notice of Hearing on such motion, Hart has placed this matter before the Court and on the Court's calendar for a hearing on March 16, 2011. Moving that hearing is a *procedural* matter which is now largely, if not completely, out of Hart's control. Even if the IBTA stipulated to a rescheduled hearing date, such a stipulation would not be binding on (quotation of rule omitted) In the present case, Hart has neither the stipulation from IBTA, nor the approval of the Court...Hart's unilateral rescheduling...is without validity." R. p. 317. (emphasis in order)

In its order the district court noted that:

> "No affidavit by Hart was filed supporting his counsel's claim that Hart would be absent from his legislative duties in order to attend the hearing. No reason has been stated by Hart's counsel as to why Hart would be required to be present for a purely legal [ie., non factual, non testimonial] oral argument by Hart's attorney. R. p. 317.

The district court ignored the reasoning set forth in the Amended Notice of Hearing (R. p. 313) and it did not have further information because it prepared, and faxed, the Order on the Respondents' highly unusual objection to a mere Amended Notice of Hearing twenty-two (22) hours after its receipt of the Objection and before Hart's counsel's Reply could be finished and faxed to it.

If the district court had reviewed the Amended Notice of Hearing and waited a reasonable time, it would have seen, that Hart would be required to be absent from his legislative duties to attend the hearing, the reasons why Hart's counsel was of the opinion that it was important for Hart to be present at the oral

argument, and the basis in law for the attempt to change the hearing date under Article III Section 7 of the Idaho Constitution, the Due Process Clause of the 14th Amendment to the United States Constitution and Article 1 section 13 of the Idaho Constitution. R. p. 321.

The district court's March 11th Order, in effect, holds that after *any* Notice of Hearing is filed by counsel *any rescheduling* of the hearing date *requires* a motion and order from the district court. The district court cites I.R.C.P. 6 (e) (3) as authority for its holding. Counsel has found no cases interpreting this Rule, but from its context, and common motion practice in the First Judicial District, it seems more likely than not that the reference in the cited Rule to "trial or hearing" is meant to refer to a trial or hearing scheduled by the court and not one scheduled by counsel for a party. This interpretation is buttressed by the fact that Hart's counsel contacted the district court's assistant, explained what was desired, and obtained two new hearing dates available on the court's calendar without there ever being a concern expressed that the court had to first rule on changing the hearing date before it could be rescheduled.

At the March 16th hearing the district court ruled from the bench on Hart's Motion for Reconsideration of its Order requiring the hearing to be held on March 16th. Tr. p. 27-28. In the district court's written order, issued following the hearing, only notes that the request to reconsider the hearing date was denied. R. p. 343.

In ruling on the Motion for Reconsideration, regarding the hearing date, the district court made no mention of the fact that resolution of an issue of whether a hearing should be permitted to be rescheduled is one of discretion. It likewise failed to set out the standard to be applied in deciding the motion. The court merely stated:

1. "I am going to deny the motion to reconsider my order requiring the March 16, 2011 hearing." Hr. T. p. 27, l. 20-21.
2. "If Mr. Hart wants to be present telephonically, he's more than welcome." Hr. T. p. 27, l. 22-23.
3. "(the other) motions are not evidentiary." Tr. p. 27, l. 26, p. 28, l. 1.

Given the contents of the Affidavit of Hart and the Affidavit of his counsel, along with the legal argument in support of changing the hearing date to one on which Hart could attend the hearing and assist counsel, it is submitted that the district court failed to act within the outer boundaries of its discretion and that it did not act consistently with the legal standards applicable to the specific choices available to it.

The status of the record at the time of the hearing on March 16th was completely different, and more fully developed, than it was at the time of its initial Order of March 11th. On March 16th not only was there an Affidavit of Hart on file documenting what he was doing and why he was not able to attend the hearing, but there was also the affidavit of his counsel setting out specifically why it was important for Mr. Hart to be present at the hearing. Hart's affidavit further sets out

that he was present at the December 7, 2010 hearing, that he wanted to be present at this hearing, and that he could not be present at this hearing because of his duties as a Legislator in the House of Representatives.

The record is devoid of any indication that the district court undertook an analysis of either the affidavit of Hart or the affidavit of his attorney. It merely mentioned "There is an affidavit that's been submitted of Mr. Hart, Representative Hart." Hr. T. p. 28.

No analysis of Hart's being unable to attend the hearing due to Hart's being a Representative in the House of Representatives that was in session, or the possible impact of Article III Section 7 of the Constitution of the State of Idaho on whether the hearing should be permitted to be rescheduled, was undertaken by the district court. The district court did acknowledge Hart as being a legislator, by tersely referring to him as "Representative Hart." The record further fails to disclose any analysis by the district court of the impact of the Due Process Clause of the 14th Amendment to the United States Constitution and Article 1 section 13 of the State of Idaho's Constitution on a determination, given the circumstances preventing Hart from attending the hearing, on whether or not it should require the hearing to proceed in Hart's absence.

Judicial discretion must be sound judicial discretion. Sound judicial discretion properly exercised will reflect the judicial policy of Idaho developed

over many years by case law, and lying within the spirit of liberality mandated by I.R.C.P. Rule 1. *Bunn v. Bunn, 99 Idaho 710, 711-712, 587 P. 2d 1245, 1246-1247, Reeves v. Wisenor, 102 Idaho 271, 629 P. 2d 667 (1981).*

Undersigned counsel has not been able to locate an Idaho or U.S. Supreme Court decision directly on point, but many cases have discussed the need to grant extensions of time when the request has not been waived, the request has been asserted, and the request has been accompanied with affidavits establishing a reasonable basis for the request.

The United States Constitution provides:

> "(N)or shall any state deprive any person of life, liberty, or property without the due process of law..." U.S. Const. amend XIV.

The Idaho Constitution reads:

> "No person shall be...deprived of life, liberty or property without due process of law." Idaho Const. art. 1 § 13.

The right to procedural due process guaranteed under both the Idaho and United States Constitutions requires that a person involved in the judicial process be given meaningful notice and a meaningful opportunity to be heard. *Rudd v. Rudd, 105 Idaho 112, 666 P. 2d 639 (1983)*

The prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitution and political history, that

we place on a person's right to enjoy what is his, free of governmental interference. *Fuentes v. Shevin, 92 S.Ct. 1983, 407 U.S. 67, 81 (1972)*

Within the limits of practicability a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause. *Boddie v. Connecticut, 91 S.Ct. 780, 401 U.S. 371, 786-787 (1971).*

"Due process of Law," as used in section 13 Article 1 of the constitution of the State of Idaho, and also in the 14th Amendment to the constitution of the United States, when applied to judicial proceedings, means that every litigant shall have the right to have his cause tried and determined under the rules of procedure, the same as are applied to other similar cases. *Eagleson v. Rubin, 16 Idaho 92, 100 P. 765 (1909).*

There is no reason why the required due process for the deprivation of liberty, as applied in criminal cases, should not also apply in civil cases when a person faces the danger of being deprived of property. This Court held in *State v. Carver, 94 Idaho 677, 496 P. 2d 676 (1972),* when it was presented with a case of first impression regarding the right of a defendant in a criminal proceeding to be present during the impaneling of a jury, "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend" and if it will be in his power if present at the proceeding "to give advice or suggestion or even to supersede his lawyers altogether and conduct the trial himself" the party's personal

presence is required under the Due Process Clause of the Idaho and United States Constitutions. *Id.* Also as this Court has previously held, in the context of a criminal proceeding, that there is no doubt of the right of a defendant to be present at proceedings affecting his liberty where he requests that privilege. *see State v. McGinnis, 12 Idaho 336, 85 P. 1089 (1906).* Likewise, in a civil proceeding wherein a party is facing the deprivation of property at the hands of the State, if the party's presence has a relation, reasonably substantial, to the fullness of his opportunity to defend, and if it will be in his power if present at the proceeding to give advice or suggestion or even to supersede his lawyer altogether, the parties personal presence is required under the Due Process Clause of the Idaho and United States Constitutions.

Hart's requested presence at the hearing had a relation, reasonably substantial, to the fullness of his opportunity to participate in his Motion for Reconsideration of the district court's Order depriving him of property, and it would have been in his power, if he was present at the proceeding, to give advice or suggestion or even to supersede his lawyers altogether and conduct the trial himself.

As a general rule no party should be free, whenever he pleases to withdraw himself from the courts and to break up a trial, or a hearing, that has been scheduled. *see State v. Morgan, 127 Idaho 798, 907 P.2d 116 (Idaho App. 1995).*

In an instance when a party is unable to be present at a hearing, and has not waived his right to be present, the district court is required by Due Process to:

1. Make sufficient inquiry into the circumstances of his absence to justify a finding whether the absence was voluntary;
2. Make a preliminary finding of whether the absence is voluntary or not;
3. Afford the party an adequate opportunity to explain the absence.

The district court ruling requiring the hearing to proceed appears reflects no consideration being given to the reason for Hart's absence and it certainly undertook no analysis of whether or not the absence was voluntary or for good cause.

In considering Hart's reasonable attempt to have the hearing held at the next available date for the district court, when he could be personally present, it was an abuse of discretion for the district court to reject the change without a showing of actual and demonstrated prejudice to the Respondents. Such prejudice must consist of more than asserted concerns about the passage of time. *see Aho v. Idaho Trans. Dept. of State, 145 Idaho 192 P. 3d 406, 409 (Idaho App. 2008).*

Respondents' motion objected to the change of the hearing date merely because "There is no reason why respondent should have to wait nearly 6 months after the entry of the original Order to learn whether the Order is final." R. p. 315. In oral argument it was merely asserted "I see no reason for delay." T. p. 27.

In response to these assertions, Hart's counsel pointed out:

> "As the Court is well aware, there's numbers of times when there will be certain motions that are heard and out-of-location counsel will participate by telephone...if it is important enough for the attorney general to have a deputy travel all the way from Boise to attend a hearing as opposed to merely participating by telephone, it's certainly more important for my client to be able to be here." T. p. 25

In this matter there was absolutely no assertion of prejudice by Respondents, Hart's requested delay was not inordinate because it was the very next date available to the district court, and a valid excuse had been tendered to the district court. As documented by the affidavits of Hart and his counsel, the Amended Notice of Hearing was promptly filed upon receipt of facts necessitating the change in date of the hearing so that Hart could attend.

Simply put there was no constitutionally required analysis undertaken by the district court in making its determination to proceed with the hearing in Hart's absence under the circumstances. The district court's determination to proceed with the hearing in the face of no asserted prejudice by Respondents is not consistent with the 14th Amendment to the United States Constitution or Article 1 section 13 of the Idaho Constitution. Such a determination is not consistent with the principles which have been established by our system of jurisprudence, and our constitutions, for the protection and enforcement of private rights.

ARGUMENT

3. Hart is entitled to an award of reasonable attorney fees incurred in this appeal.

Idaho Appellate Rule 41 allows the Court to award attorney fees if there is statutory or contractual authority that permits the awarding of fees. Idaho Code §12-121 provides for the award of reasonable attorney fees to the prevailing party and such an award is appropriate when the Court has the abiding belief that the appeal was defended frivolously, unreasonably, or without foundation. *Lovelass v. Sword, 140 Idaho 105, 90 P.3d 330 (2004).* Hart asks the Court to award him reasonable attorney fees incurred in this appeal.

At this point in time it is not known what Respondents' reply will make in this appeal. It is known however that the Tax Commission and the Board of Tax Appeals, in support of their I.R.C.P. Rule 12 (b) (1) motion to dismiss at the initial hearing on December 7, 2010, argued facts that they asserted were, from their perspective, uncontroverted. Hr. T. p. 6-13. A few of their specific arguments of facts were:

1. "...this is in the record in the tax commission decision." Hr. T. p. 7, l. 13-14.

2. "In footnote one of the tax commission's decision it is noted..." Hr. T. p. 7, l. 16-17.
3. "On March 31, 2010,...appellant attempted to file an appeal. The letter came with two checks, but even in that letter, which is in the Board of Tax Appeal's record..."[8] Hr. T. p. 9, l. 14-18.
4. "But in a matter which began in 2008 there was a pattern of delay and obstruction." Hr. T. p. 14, l. 10-11.
5. "What is uncontroverted in this case is that Mr. Hart received a copy of a decision on October 9, 2009, and that no appeal was filed until March 31st, 2010.[9] Hr. T. p. 16, l. 6-8.

Hart responded to this factual argument submitted in determination of a facial determination of jurisdiction by arguing:

1. "We're here today on a 12 (b) (1) motion to dismiss for lack of jurisdiction of this appeal in this court." Hr. T. p. 14, l. 18-20.
2. "Those are all factual issues that come out when the Court renders a reasoned decision. That reasoned decision comes when the Court

[8] This comment in addition to being a factual assertion is noteworthy because it was later conceded by Respondents that the Notice of Appeal was mailed on March 30, 2010. Respondents' Supplemental Response to Appellant's Motion for Reconsideration, p. 2, l. 6. During oral argument on March 16, 2011 Respondents asserted, "The Attorney General's Office nor the tax commission had any knowledge of the postmark date on the appeal until we received the record until it was filed with this court from the Board of Tax Appeals." Hr. T. p. 38, l. 14-28. This assertion raises the question of if so, why did Respondents argue, as an established fact, at the hearing on December 7 (as quoted) that Hart "on March 31, 2010...attempted to file an appeal"? Hr. T. p. 9, l. 14-18.
[9] See footnote 4

exercises jurisdiction pursuant to the law on an appeal from a decision from the tax appeals." Hr. T. p. 15, l. 7-11.

3. This isn't a collateral proceeding like Ag Air.[10] Mr. Hart is following the procedure. That is why we don't revisit issues below in a motion to dismiss for lack of jurisdiction." Hr. T. p. 15, l. 15-19.

At the hearing on Hart's Motion for Reconsideration held on March 16, 2011, the Tax Commission and the Board of Tax Appeals continued to argue facts not contained in the pleading. A few of the specific arguments of facts were:

1. "None of this – these two things did not occur until October 14, 2010." Hr. T. p. 39, l. 5-7.[11]
2. "The Court understood the arguments and the facts." Hr. T. p. 39, l. 23-24.[12]
3. "Everybody understands the facts, and the respondent certainly understands the facts..." Hr. T. p. 40, l. 6-8.[13]

Hart's arguments at the hearing on March 16, 2011 again focused on a facial determination of jurisdiction based on the pleadings.

---

[10] Ag Air, Inc. v. Idaho State Tax Commission, 132 Idaho 345, 972 P. 2d 313 (1999)
[11] This assertion, one of fact, is unquestionably erroneous also.
[12] This assertion again highlights the factual allegations, but it also raises the question of how the district court could have understood the facts now that the Respondents have finally conceded that the Notice of Appeal was filed, by mail on March 30, 2010 and not March 31, 2010.
[13] On a facial determination of jurisdiction "facts" are not the issue. Obviously due to the admission that the Tax Commission was not aware of the filing by mail referenced until after the record was provided in this case, as discussed in footnote 4, and as set forth in the Affidavit of Phil Hart filed in support of his motion for reconsideration there is significant disagreement as to what the "facts" are and are not.

1. "...under a facial, the issue is based upon the pleadings." Hr. T. p. 29, l. 17-18.
2. If it is believed that "there's a factual challenge to jurisdiction...the proper method is to proceed to an evidentiary hearing at which a record is established. I think where the split in the road came was that the attorney general argued and the Court accepted that the record on appeal from the Idaho Tax Appeals was a record, fact. In fact, as I pointed out in the Gracie case which I cited to the Court...it's merely an articulation of the position of the State Tax Commission. That is all it is. It is not proof of facts." Hr. T. p. 5-15.
3. "The attorney general once again argues to the Court based upon the argument and facts. As Gracie tells us...that record is merely an articulation of the position, and if we want to get to a factual determination of jurisdiction, we have an evidentiary hearing. There are no facts. They say there are no new facts. True, there aren't any facts right now." Hr. T. p. 40, l. 21-15, p. 41, l. 1-3.

Hart's counsel found himself "speechless" after hearing the deputy attorney general, once again, frame his argument on an IRCP 12 (b) (1) motion to dismiss based upon "facts." Hr. T. p. 40, l. 22.

Respondents not only submitted affidavits in support of their IRCP 12 (b) (1) motion to dismiss the Respondents but they have also at all times proceedings argued "facts" as the basis for their motion. Such position and argument on a facial challenge to subject matter jurisdiction is not appropriate, and apparently led to the error of the district court in considering the agency record as proof of facts when they were clearly in dispute, and not a part of any pleading. Assuming that Respondents' defense to this appeal will be consistent with its position before the district court, it will be frivolous, unreasonable, and without foundation.

CONCLUSION

The Judgment of the district court dismissing Hart's petition should be reversed and this matter remanded to the district court. If the Respondents wish to pursue a factual challenge to subject matter jurisdiction a hearing should be scheduled for an available time on the district court's calendar that permits Hart to attend without his having to miss his legislative duties while the legislature is in session. Otherwise the district court should proceed to schedule a trial *de novo*.

Appellant Hart should be awarded his attorney fees and costs incurred in this appeal.

DATED this 5 day of August, 2011.

Starr Kelso

Starr Kelso, Attorney for Appellant Hart

CERTIFICATE OF SERVICE: I certify that I served two copies of Appellant's Opening Brief on Respondents on the 5 day of August, 2011, by sending the same by United States Mail, postage prepaid thereon, in an envelope addressed to:

WILLIAM A. von TAGEN
Deputy Attorney General
State of Idaho
P.O. Box 6
Boise, Idaho 83722
Attorney for Respondents

Starr Kelso